



SSC Guidance

Delegations under Section 41 of the State Sector Act 1988

Effective April 2014

Introduction

- 1 The State Sector Act 1988, Public Finance Act 1989, and Crown Entities Act 2004 were amended in July 2013. These amendments provide for improved management of the State sector system, and support innovation and efficiency in State services delivery.
- 2 The amendments to the State Sector Act include changes to section 41, which enable Public Service chief executives (of both departments and departmental agencies) to delegate functions or powers to persons outside the Public Service, including the private sector. The amendments to section 41 also expand and clarify the powers of chief executives to delegate functions or powers to individuals within the Public Service.
- 3 This Guidance provides chief executives and officials with an overview of section 41 as amended, together with practical suggestions for implementing the section's expanded powers of delegation. It includes a draft template delegation in Appendix 1. The full text of section 41, as amended, is set out in Appendix 2.

Overview

- 4 The changes to section 41 promote greater flexibility in the choice and use of service delivery and decision-making within the Public Service and across the State services, subject to appropriate checks and balances that ensure the expanded delegation powers are exercised carefully and responsibly. Chief executives may now delegate statutory functions and powers between agencies, and (subject to the safeguards) to appropriate non-government service providers.
- 5 Section 41 now creates two main categories of delegation:
 - 5.1 Section 41(1A) deals with delegations within the Public Service, establishing that personnel from any Public Service department – including secondees from elsewhere in the State services and contractors working on departmental business – may be engaged by a chief executive to carry out specific Public Service functions or powers.
 - 5.2 Section 41(2A) deals with delegations outside the Public Service. This subsection is new and is a fundamental change in the scope of chief executives' delegation powers. The expanded powers of delegation – to potential recipients outside the core Public Service, including the private sector – are accompanied by statutory safeguards to ensure that the new regime is subject to appropriate controls and monitoring.
- 6 The provisions of section 41 are enabling, not prescriptive. No chief executive is required to delegate any function or power outside the department. Chief executives are not expected to suddenly open the floodgates and start delegating substantial portions of their functions.
- 7 A large number of delegations will continue to be made under various other statutory regimes; these delegations are not affected by section 41. The extended ability to delegate under section 41 is simply an additional tool to be used selectively, safely, and appropriately – to optimise service delivery and decision-making by those persons best-suited to the circumstances, and to support the policies of the government of the day.

General Principles of Delegation Continue to Apply

- 8 Section 41, as amended, does not alter the general principles applicable to Public Service delegations. For example:
- 8.1 Chief executives retain responsibility for performance of delegated functions or powers, notwithstanding the delegation – see section 41(7);
 - 8.2 Delegations do not prevent the chief executive from also exercising the power or performing the function – see section 41(7);
 - 8.3 Delegations are subject to any limitations or controls imposed by the chief executive – see section 41(3); and
 - 8.4 Delegations may be revoked by the chief executive at any time – see section 42.

Section 41(1): Chief Executives' Delegation Powers

- 9 The amended section 41(1) maintains the wide potential scope to delegate “*any of the functions or powers of the chief executive under this Act or any other Act,*” including functions or powers that have been delegated to the chief executive.
- 10 Section 41(1) continues two general limitations on chief executives' delegation powers:
- 10.1 If the chief executive proposes to delegate functions or powers that have been delegated to the chief executive by a Minister, the Minister must give prior written approval (section 41(1)(a));
 - 10.2 If the chief executive proposes to delegate functions or powers that have been delegated to the chief executive by the State Services Commissioner, the Commissioner must give prior written approval (section 41(1)(b)).

Section 41(1A): Delegations Inside the Public Service

- 11 Potential holders of delegations inside the Public Service now include the following individuals or office-holders:
- 11.1 Section 41(1A)(a) – “*another Public Service chief executive*”:
 - 11.1.1 This is unchanged.
 - 11.2 Section 41(1A)(b) – a “*Public Service employee*”:
 - 11.2.1 The word “employee” is retained, but it is now clear that “employee” may be any Public Service employee.
 - 11.2.2 Previously, varying interpretations of the old section 41(1) would have either limited “employee” to persons within the chief executive's department, or in the alternative extended “employee” to persons in any part of the State services;
 - 11.3 Section 41(1A)(c) – an “*individual working in the Public Service as a contractor or as a secondee from elsewhere in the State services*”:
 - 11.3.1 This subsection is new. It widens the power of chief executives to delegate to contractors, or to secondees from elsewhere in the State services
 - 11.3.2 The restriction in section 41(1A)(c) to “a function or power of the Public Service” is intended to have the practical effect that, say, a plumber or electrician called in to fix departmental equipment would not be a potential delegate. Only those contractors or secondees who have been engaged “in relation to a function or power of the Public Service” are potential delegates under section 41(1A)(c). For example, a

contractor acting as a general manager with financial or HR responsibilities deriving from the chief executives functions and powers under the Public Finance Act and State Sector Act, would be a potential delegate.

- 11.3.3 There was no intention to change a department's ability to contract for services. The ability to delegate to contractors under this section (or section 41(2A)) does not affect the ongoing power to contract. For example, a department could still engage a consultancy firm to design a new process, without providing any delegations to the company or its employees.
- 11.3.4 In addition, there was no intention to distinguish between contractors acting personally and employees of contractors. While the meaning of the term "contractor" is ultimately a matter of interpretation, the policy intention was that it would carry the meaning widely understood within departments. The policy intention was that section 41(1A)(c) would cover both people directly engaged on a contract for service and those employed by a contractor (such as a consultancy firm) and deployed into the department.
- 11.4 Section 41(1A)(d) – the "*holder for the time being of any specified office in the Public Service*":
 - 11.4.1 This subsection continues the ability to delegate to an office rather than a named individual.
 - 11.4.2 The "holder of a specified office" is not equivalent to a "statutory officer"; for example, chief legal advisors, chief financial officers, and the Government Chief Information Officer, may be regarded as holders of "specified offices" for the purposes of particular delegations. In these cases, the delegation would be in the name of the office not the incumbent person. Delegations to an office do not need to be refreshed if the office holder changes.

Section 41(2): Sub-delegation of section 41(1A) functions or powers

- 12 Section 41(2) provides that functions or powers that have been delegated under section 41(1A) (delegations within the Public Service) may be sub-delegated to "any other person described in subsection (1A)". Written approval of the relevant chief executive is required before the sub-delegation is made.

Section 41(2A): Delegations Outside the Public Service

- 13 Chief executives may now delegate to persons (individuals or "legal persons" such as companies) outside the Public Service, subject to statutory restrictions.
- 14 A delegation to a corporate entity (such as a company) will mean that the organisation's governing body will be required to carry out the delegated functions or powers e.g. by board resolution. As delegations outside the Public Service may not be sub-delegated (section 41(2B)), chief executives may instead choose to specify an individual, group of named individuals, or class of employees or officers within an entity, to hold a delegation.
- 15 The ability to delegate outside the Public Service is not entirely new, as specific powers to delegate in this way exist in a range of statutes. However, by providing a general power to chief executives to delegate outside the Public Service, section 41 facilitates flexibility to achieve an appropriate fit between services and providers, where the chief executive's own department may not be best-placed to carry out a particular function or power.

- 16 Section 41 also provides a comprehensive set of controls on delegations outside the Public Service, as follows:
- 16.1 Section 41(2A) – only a “clearly identified” function or power may be delegated to an outside person:
 - 16.1.1 The words “clearly identified” have the effect of preventing generic delegations of a chief executive’s functions or powers to an outside delegate;
 - 16.1.2 It would not be lawful, for example, for a chief executive to delegate “all my powers and functions,” or “all my powers and functions under [a particular] Act”;
 - 16.1.3 A delegation of a function or power should specify the particular subject matter of the delegation, any statutory basis for the delegated function or power, any appropriate limitations or controls on the exercise of the delegation, any appropriate time periods for the exercise of the delegated function or power, and other details that assist with clearly identifying the nature and scope of the delegation.
 - 16.2 Section 41(2A)(a) – the Minister’s prior written approval must be obtained for any outside delegation.
 - 16.3 Section 41(2A)(b) – the delegating chief executive must expressly satisfy himself or herself that any potential conflicts of interests will be avoided or managed. Chief executives should address this matter explicitly in their advice to the Minister seeking approval to issue a delegation.
 - 16.4 Section 41(2B) – a recipient of a delegation outside the Public Service cannot sub-delegate a delegated function or power.
 - 16.5 Section 41(2C) – an outside delegation must be noted and described by the chief executive in the department’s (or departmental agency’s) annual report. To this end:
 - 16.5.1 the annual report must also describe “how effectively the delegated function or power was performed or exercised”; and
 - 16.5.2 the chief executive may require the delegate to supply all appropriate information for the purpose of monitoring the delegation and reporting on it.
 - 16.6 Section 41(2D) – the outside delegate must comply with all relevant statutory obligations, and with all relevant obligations from the State Services Commissioner’s Standards of Integrity and Conduct for the State Services (the Code). Our guidance is that:
 - 16.6.1 any relevant statutory provisions should be identified for the delegate in the letter of delegation or contract;
 - 16.6.2 chief executives should also examine the Code to ensure that the relevant provisions are stated in the letter of delegation or contract with sufficient specificity to inform the delegate of his or her obligations in regard to integrity and conduct – in most cases, all of the obligations of the Code will be required to be observed.
 - 16.7 Section 41(2E) – Information held by an outside delegate is deemed to be held by the department (or departmental agency) for the purposes of the Official Information Act 1982.
 - 16.8 Section 41(2F) – the Ombudsmen Act 1975, as well as the Official Information Act 1982, apply to an outside delegate in the performance of a delegated

function or the exercise of a delegated power. Outside delegates will therefore be required to meet the obligations imposed by these statutes, to the extent that they relate to the performance of the delegated function or power. Our guidance is that contracts containing outside delegations should specify the arrangements that the parties will use to deal with OIA requests and similar information management matters.

Miscellaneous Provisions of Section 41

- 17 Section 41(3) is in similar terms as the old section 41(3) – it provides that a delegate has (subject to any general or specific directions or conditions) authority to exercise delegated functions or powers in the same manner, subject to the same restrictions, and with the same effect as the chief executive.
- 18 One important set of restrictions that continue to apply to delegates both inside and outside the Public Service, if the delegation includes financial authority, is the need to follow Treasury instructions and other requirements regarding public financial management. These instructions relate to the processes and controls for departmental financial decision-making, and are explained in more detail on Treasury’s website at <http://www.treasury.govt.nz/publications/guidance/instructions>. Chief executives will remain responsible for performance against the instructions, and will need to ensure that delegates are familiar with and can comply with these requirements.
- 19 Section 41(4) is unchanged. It addresses the relationship between the powers of delegation under section 41 and other statutory powers to delegate:
 - 19.1 Section 41(4)(a) states that a chief executive’s power to delegate under section 41 is subject to “*any prohibitions, restrictions, or conditions contained in any other Act*”. For example, s33 of the Serious Fraud Office Act 1990 refers to a range of powers that may be delegated only to designated employees of the Serious Fraud Office, and s10 of the Corrections Act 2004 lists a range of powers that the chief executive must not delegate to any staff member of a prison. Those restrictions are not affected by (and cannot be overridden by) section 41.
 - 19.2 Section 41(4)(b) confirms that, conversely, the powers to delegate under section 41 do not “*limit any power of delegation conferred on the chief executive by any other Act.*”
- 20 Section 41(4A) is new. It provides that, where a written document is used to inform a person of an action taken by a delegate outside the Public Service (i.e. where someone has exercised a power or function pursuant to a delegation under section (2A)), the document must state: that the action was taken by a delegate; the delegate’s name and office; and that a copy of the instrument of delegation may be inspected at the chief executive’s office.
- 21 Sections 41(5), 41(6), and 41(7) have not changed. They provide:
 - 21.1 Section 41(5) – delegates are presumed to be acting in accordance with the terms of a delegation;
 - 21.2 Section 41(6) – in all cases, delegations under section 41 (within the Public Service or outside the Public Service) may be made to a specified person or to persons “of a specified class,” or “to the holder or holders for the time being of a specified office or specified class of offices”;
 - 21.3 Section 41(7) – the delegating chief executive maintains responsibility for the actions of a person acting under a delegation, and the delegation does not prevent the chief executive from exercising the delegated functions or powers.

Form of Delegations

- 22 All delegations under section 41 must be in writing (section 41(1)). Delegations will generally be made either through a formal contract or by way of a letter of delegation.
- 23 In either case, where the delegation is to be made publicly available, best practice would enable any terms that contain commercially sensitive material (e.g., rates of payment) to be kept confidential. Therefore, it might be appropriate to put commercially sensitive terms in a separate document or schedule.
- 24 Where the delegate is receiving payment for carrying out delegated functions or powers, a contract will usually be required. A contract will also be appropriate where the delegate is required to exercise the delegation in specific circumstances, or where there are other necessary matters (e.g., particular reporting requirements that are expected of the delegate) that can only be set out properly and enforced through a contract.
- 25 A letter of delegation may be the most appropriate instrument when the delegate is given discretion in making relevant decisions, and does not need to be contractually bound to perform in any way. For example, in a particular situation affecting a 15-year-old pupil, the Secretary for Education may decide to delegate to a community leader or family or whanau member the power to decide whether to exempt that person from enrolment – such a delegation could be effected by a simple letter.
- 26 Any letter of delegation, or any contract containing a delegation, may set out appropriate conditions or limitations on the use of the delegated powers or functions.

Draft Template Letter

- 27 Chief executives may wish to use the draft template letter in Appendix 1 for delegations under section 41 to persons outside the Public Service, or to adapt it for inclusion in a contract.
- 28 The draft template letter in Appendix 1 addresses the following matters:
 - 28.1 The statutory basis for the delegation;
 - 28.2 The functions or powers being delegated;
 - 28.3 Any limitations on the delegation;
 - 28.4 The term of the delegation;
 - 28.5 The lack of authority to sub-delegate;
 - 28.6 Any items particular to the delegation;
 - 28.7 Applicability of the OIA and Ombudsmen Act;
 - 28.8 Applicable principles of delegation (e.g., a delegation does not absolve the chief executive from accountability; duty to comply with the law and designated policies and codes; etc);
 - 28.9 A requirement to disclose any conflicts of interest that may arise in relation to the delegation;
 - 28.10 Where applicable, guidance regarding the Crown's legal professional privilege.
- 29 If a delegation is to a person inside the Public Service, the attached letter can be modified. For example, as powers or functions delegated inside the Public Service may be sub-delegated, the chief executive may choose to give prior written approval.

Delegations and Legal Professional Privilege

- 30 If a chief executive anticipates that a delegate will need legal advice or representation relating to the exercise of the power or function, then:

- 30.1 the chief executive should state specifically in the contract or letter of delegation how the advice should be obtained, and consider directing the delegate as to who will supply those legal services (noting that Crown Law must be instructed in relation to certain matters); and
 - 30.2 the delegate should be advised not to disclose any legal advice that he or she receives on behalf of the Crown, without the permission of the Attorney-General.
- 31 The position regarding privilege for legal advice that the delegate seeks by their own initiative, or independently of performance of the function, is more complex, and specific legal advice on this point should be sought at the time that the advice is obtained.
- 32 Cabinet's statement on legal professional privilege may be found in Cabinet Office Circular CO (05) 5.

Further information

Please feel free to contact SSC Legal for advice or assistance regarding the operation of section 41, as amended. Any questions or suggestions regarding this guidance may be directed to SSC Legal on 04 495 6713.

APPENDIX 1: draft template delegation letter

Delegation pursuant to section 41 (outside the Public Service)

[Date]

To: [Name of delegate]

Dear [Name of delegate]

Delegation of authority – [Subject matter of delegation]

Pursuant to section 41 of the State Sector Act 1988 (the Act), and with the written approval of [state which Minister has given approval], I delegate to you [clearly identify the delegated functions or powers].

This delegation is subject to the proviso that [set out any limitations on the delegation, including statutory limitations]. You must personally exercise the delegated functions or powers, and may not sub-delegate. [If the delegation is to a company, consider specifying the individual or group of individuals, such as the board chairperson and chief executive officer, who may exercise the delegation.]

This delegation will commence on [date or event] and will terminate (unless revoked or extended prior to termination) on [date or event].

In making any decision under this delegation, you must comply with all relevant statutory obligations [set out applicable statutory provisions], and with all relevant obligations under [set out applicable policies, codes, and practices, including the Standards of Integrity & Conduct (Code of Conduct issued by the State Services Commissioner)].

Information held by you in relation to the performance of this delegation is, for the purposes of the Official Information Act 1982, deemed to be held by [name of department or departmental agency]. Both the Official Information Act 1982 and the Ombudsmen Act 1975 apply to your performance of this delegation. If you receive a request or direction under the Official Information Act 1982 or Ombudsmen Act 1975, [set out process to be followed].

I have satisfied myself that the potential conflicts of interest you have disclosed will be properly avoided or managed. Please ensure that you disclose and manage any further conflicts or potential conflicts of interest that may arise in relation this delegation.

This delegation will be noted in our departmental annual report. You will be required to supply whatever information I may require for the purpose of monitoring the delegation and reporting on it.

[Optional] Note that legal advice obtained relating to [the power of function] will be protected by the Crown's legal professional privilege. You may not disclose any legal advice that you receive without express permission from the Attorney-General.

DATED this day of _____.

[Name]
Chief Executive

APPENDIX 2

Section 41 of the State Sector Act 1988, as amended

Delegation of functions or powers

- (1) A Public Service chief executive may, either generally or particularly, delegate in writing to a person described in subsection (1A) or (2A) any of the functions or powers of the chief executive under this Act or any other Act (including functions or powers delegated to the chief executive under this Act or any other Act), except that—
- (a) the delegation of functions or powers delegated to the chief executive by a Minister requires the prior written approval of that Minister; and
 - (b) the delegation of functions or powers delegated to the chief executive by the Commissioner requires the prior written approval of the Commissioner.
- (1A) The following persons may be a delegate under subsection (1) or a subdelegate under subsection (2):
- (a) another Public Service chief executive:
 - (b) a Public Service employee:
 - (c) an individual working in the Public Service as a contractor or as a secondee from elsewhere in the State services in relation to a function or power of the Public Service:
 - (d) the holder for the time being of any specified office in the Public Service.
- (2) A person to whom a function or power has been delegated under subsection (1) by a chief executive may, with the prior written approval of that chief executive, subdelegate the function or power to any other person described in subsection (1A).
- (2A) A Public Service chief executive may delegate under subsection (1) a clearly identified function or power to a person outside the Public Service (whether or not the person is within the State services), but only after—
- (a) obtaining the appropriate Minister's prior written approval; and
 - (b) satisfying himself or herself that any potential conflicts of interest will be avoided or managed.
- (2B) However, a delegate described in subsection (2A) may not subdelegate the delegated power or function under subsection (2).
- (2C) A delegation described in subsection (2A) must be noted, with a description of how effectively the delegated function or power was performed or exercised,—
- (a) in the case of a delegation made by the chief executive of a department, in the annual report of that department; or
 - (b) in the case of a delegation made by the chief executive of a departmental agency, in the annual report of that departmental agency.
- (2D) A delegate described in subsection (2A) must comply with the following obligations in relation to the performance of a delegated function or the exercise of a delegated power (in the same way as a delegate described in subsection (1A) must comply with them):
- (a) all relevant statutory obligations; and
 - (b) all relevant obligations in a code of conduct set by the Commissioner under section 57(2).

- (2E) Any information held by a delegate described in subsection (2A) in relation to the performance of a delegated function or the exercise of a delegated power is, for the purposes of the Official Information Act 1982 (see section 2(5) of that Act), deemed to be held by,—
- (a) in the case of a delegation made by the chief executive of a department, that department; or
 - (b) in the case of a delegation made by the chief executive of a departmental agency, the host department of that departmental agency.
- (2F) In relation to the performance of a delegated function or the exercise of a delegated power, the Ombudsmen Act 1975 and the Official Information Act 1982 apply to a delegate described in subsection (2A) as if the delegate were an organisation named in Schedule 1 of the Ombudsmen Act 1975.
- (3) Subject to any general or special directions given or conditions imposed by the chief executive, the person to whom any functions or powers are delegated under this section may exercise those functions or powers in the same manner, subject to the same restrictions, and with the same effect as if they had been conferred on that person directly by this Act and not by delegation.
- (4) The power of the chief executive to delegate under this section—
- (a) is subject to any prohibitions, restrictions, or conditions contained in any other Act in relation to the delegation of the chief executive's functions or powers; but
 - (b) shall not limit any power of delegation conferred on the chief executive by any other Act.
- (4A) Where a chief executive or a delegate of the chief executive uses a written document to inform any other person of an action taken by a delegate of the chief executive, the document must—
- (a) state that the action was taken by a delegate of the chief executive; and
 - (b) give the delegate's name and office; and
 - (c) inform the other person that a copy of the instrument of delegation may be inspected at the chief executive's office.
- (5) Every person purporting to act pursuant to any delegation under this section shall, in the absence of proof to the contrary, be presumed to be acting in accordance with the terms of the delegation.
- (6) Any delegation under this section may be made to a specified person or to persons of a specified class, or to the holder or holders for the time being of a specified office or specified class of offices.
- (7) No such delegation shall affect or prevent the exercise of any function or power by the chief executive, nor shall any such delegation affect the responsibility of the chief executive for the actions of any person acting under the delegation.